No. 2858

IN THE

# United States

# Circuit Court of Appeals

## For the Ninth Circuit

GIN DOCK SUE,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

# Apellant's Petition for a Rehearing

GEO. A. McGOWAN,
Attorney for Appellant.
Bank of Italy Building,
San Francisco, California.

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*To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:*

This Appellant presents this his petition for a rehearing, based upon what he believes to be a misconception of fact upon one point, and a request for

consideration upon an additional point of law involved in the issues of this case.

The misconception upon the question of fact to which reference is made, has to do with the official standing of this Appellant as an attache of the Chinese Consulate for the port and district of San Francisco. The concluding part of the Court's opinion in dealing with the official standing of this appellant states as follows:

> "By reason of his being such an officer, the Chinese Consul avails himself of his assistance in doing consular work, but we infer that he is not a regular attendant of the consul, any more than are the secretaries of all the six associations of Chinese residents in this country."

A little historical reference to the great legal principle underlying this point may not be amiss. The Government of the United States maintains a court known as the "United States Court for China" at Shanghai, China, which court is within the appellate jurisdiction of this Honorable Court. The function of this court is to have jurisdiction of all matters affecting citizens of our country within China. In other words, the Government of the United States conceived the principle that it desired the rights of its own citizens protected by its own courts even within the territorial jurisdiction of the Empire of China. The Chinese government consented to this arrangement, which it might be noted was similar to the foreign courts which were established through

the Turkish Empire during the years ante-dating the present European war. The Chinese government, with the tacit consent of the political branch of our own government, has all these years maintained in San Francisco, these consolidated six companies, which in their collective capacity, through the officers of the company, sit as a court of arbitration, settling disputes and differences arising among the Chinese people. The members of this court or commission, for such it would seem to be, are respectively the officers of the various six companies. The deliberations of this body are under the direct general supervision of the Chinese Consulate. This body is, of course, also commercial in character, and it has many duties and functions to perform which appertain to the work of the Consulate in the way of promoting the commercial interests and intercourse of the Chinese people with their own country. All of this is done under the supervision of the Chinese Consulate, and all of these officers are attached to the Chinese Consulate, and form the membership of his advisory council. We, as a government, have obtained from China the concrete right to maintain a fully recognized court of justice within the Chinese Empire, and in return we have permitted the maintenance of these courts of arbitration among the Chinese here in our midst. The opinion of the Court in this matter upon this head seems to consider the post of consul as that having to do with diplomatic negotiations or negotiations which directly affect the Chinese government politically in its relation with our government,

but it is respectfully submitted that this consideration is to the exclusion of by far the greater duties of all consular representatives. The consular representatives are really mainly commercial agents, who make their commercial reports, setting forth information about the trade reports and possibilities for increasing both the domestic and foreign trade of their country, and also generally looking after the interests of their countrymen. In the present case the duties of this advisory board fall directly within the purview of these governmental functions. To say that this condition is not recognized by the Chinese government would seem to be a conclusion directly in the face of the evidence. The testimony of the Chinese Consul is to the effect that the Six Companies is formed and made up upon the basis of political conditions existing in China at the present time. That the presidents of these companies are elected in China and come to this country as Chinese bearing the certificate of the Chinese Minister accredited to the United States in recognition of their election. The secretaries of these companies are also elected according to the political subdivisions in China. They are recognized by the evidence of their personal identity, which is furnished by the recognition of their official position by the Chinese Consul General himself. If the secretary should be in China at the time of his election he would receive his letter of credentials from the Chinese Minister just as do the Presidents of these various companies, and on the other hand should the president of a company be elected here, he would receive no cer-

tificate of identity from the Chinese Minister at Washington, but his official status would be evidenced by the official recognition of the Chinese Consul General of this port, of his official status as the president of this company. It certainly is an unjust criterion to say that these officers only render services if they happen to be called upon by the Chinese Consulate, because in point of fact the Chinese Six Companies, at which these officers have to attend as an advisory council, hold various meetings every week wherein are determined matters of political and commercial importance, and where the welfare of the Chinese of this country is, as a political issue, taken up and discussed. The political branch of the Government of the United States has recognized for many, many years the existence of these conditions, and whether treated merely as a "sop" or as a political recognition of more substantial value to China in return for the more substantial privilege of the territorial United States Court in China, the fact nevertheless remains undisputed that the right of the members of this advisory board of the Consulate to be considered and classed as Consular attaches is one firmly fixed and time honored in its observance by the political branch of the Government of the United States.

Indeed, the position of this appellant instead of being a superficial, honorary one, in which he only "might" be called upon to render services, is a very substantial and highly remunerative one, in which almost the entire time of the appellant is consumed in the discharge of his official duties.

The testimony of the Chinese Consul General is to the effect that were this appellant in China and coming to this country, the official certificate would be issued to him by the Chinese Minister, and he would accordingly be at once admitted into the United States as a person falling without the purview of the General Immigration Laws or the Chinese Exclusion Laws of the United States of America. This is very explicitly and clearly the testimony of the Chinese Consul General. The law does not require the performance of useless or unnecessary acts, and it must be obvious that if this appellant, a recognized official of the Chinese government, to wit: an attache of the local consul, were deported, he would at once be armed with the certificate of the Chinese Minister, and be entitled to re-admission, and certainly the law does not require the observance of idle conditions, and would not seek to impose upon the Government of the Republic of China with which government we are upon such terms of international comity.

All laws should receive a sensible construction, and where a person is shown to be entitled to re-admission into the United States, it would be an idle act to proceed with the deportation, to the end that the party deported would only immediately return and be entitled to re-admission. This court amply determined this proposition in the case of Tsoi Sin vs. United States, 116 Fed. 920, wherein the court said:

"Conceding that, by applying a literal language of the statute, it might be held that she should be deported, yet is it not evident that such a construction would necessarily lead to absurd results without any benefit to the United States? The object and intent of the law was to deport Chinese not entitled to remain. If appellant was to be deported, she would have the unquestioned right to immediately return, and would be entitled to land, and remain in this country, upon the sole ground that she is the lawful wife of an American citizen."

Further citations and authorities upon this point following the brief extract given above, are worthy of the most earnest perusal. Judge Dooling more recently had occasion to consider this same point, and gave recognition to it in ex parte Chan Shee, 236 Fed. 579, wherein the court held:

"The demurrer to the petition must, therefore, be overruled. I have less hesitancy in entering this order, because I am convinced that, if applicant were at once deported under the original order, she could return upon the same boat with full right to enter as an unquestionable wife of a domiciled merchant. The facts as stated herein are gathered from the petition itself, and the records of the Immigration Department, which, by stipulation, have been made a part thereof."

With respect to the legal significance of the political status of this appellant, we feel that the political branch of this Government, having placed the stamp of its approval upon the official status of attaches of the Chinese Consulate, that the question, being a political one, then assumes a decided aspect. This political recognition is always through the medium of the State Department. The Chinese Minister notifies the State Department that such a President or Secretary, if such a case arose, was arriving upon a certain steamer, and asks that extension of the usual courtesies to one of his official position. This in turn is passed from the State Department to the Department of Labor, and the Consul attache is immediately landed from the steamer as being a person entirely exempt from the operation of the General Immigration Laws and the Chinese Exclusion and Restriction Acts. We feel that the political branch of our Government having placed the stamp of its approval and its official recognition upon these officials as Consular attaches, that that is an end to the matter, and that courts are not at liberty to decide to the contrary. This certainly is the well settled law in both England and our own country. 2 Camp. R. 61; 15 East 81; 3 Wheaton 634; 4 Wheaton 52; 7 Wheaton 283.

SECOND:

The question of law upon which appellant feels that this Honorable Court might grant further consideration, has to do with the assumption by the

court that the fairness of the hearing before the Immigration authorities in the application of this appellant to re-enter the United States was fair. Exactly, upon the contrary, it is contended that the hearing and the action of the Immigration authorities was manifestly unfair, and their action so prejudicial, that this court would be warranted in receiving evidence upon the status of this appellant. Gin Dock Sue was a Chinese person who had procured a certificate of registration in which he was described as a person other than a laborer, to wit: a pawn broker. He applied to go to China as a laborer. He had the necessary property and family qualifications (either of which would have been sufficient) to enable him to make such a temporary trip to China. His credentials were approved by the Collector of Customs for the Los Angeles district. When he came to San Francisco to take his departure, the Collector of Customs for this district refused to approve his credentials, and refused to issue to him a laborer's return certificate. This refusal was based upon the mistaken interpretation of law that because Gin Dock Sue was registered as a pawn broker, and that a pawn broker was then classed by the Customs authorities and the Treasury Department as a merchant, that he could not avail himself of the rights of the more lowly laborer. When the appellant then attempted to depart upon the basis of his being a merchant, and he does so depart, he finds upon his return to this country that he is denied because he is a laborer. Here is a case of a man who has lived in this country for thirty-five years

and has always observed its laws. He finds himself now before the Court asking its protection. It certainly is not his fault that the customs officials and the Treasury Department officers who then had charge of the enforcement of the Chinese Exclusion laws misinterpreted the law, and refused him a laborer's certificate, upon a set of facts which would, to say the least, warrant the issuance of a laborer's certificate to him. We do not feel that it is a proper exercise of judicial consideration for the court to limit its consideration upon this point to merely the record of the immigration officials upon the mercantile status of this appellant, but that considering the broad equities of this case, there should be embraced within the field of judicial consideration, those prejudicial facts ante-dating the filing of the merchant's application which really caused the filing of a mercantile paper. Unquestionable under the law Gin Dock Sue should have been permitted to go to China on a laborer's certificate, and he was eligible to be landed as such upon his return. That is the ruling at the present time. The fact that he was not permitted to go was clearly the fault of the Government officials of the United States, and hence the responsibility in the premises should rest upon the Government, and not upon this appellant. He tried to comply with the law and the error was the error of the Government. They would not let him go as a laborer because they said he was a merchant, and then when he tried and did go as a merchant, they would not land him upon his return, because they said he is a laborer. He had the necessary qualifi-

cations to go and return as a laborer, to wit: his certificate of residence, and was doubly qualified through property interests and a family in this country. In view of these facts we feel that it clearly appears that the executive officers of the government entrusted with the enforcement of the Chinese Exclusion Laws, made a very clear mistake in interpreting the law, and that this appellant should not be held accountable therefor.

The court in its opinion in this matter treats the adverse conclusion of the Commissioner of Immigration on the application of this appellant to re-enter the United States with all the solemnity and form of a decree or judgment of a court of record, nay, even higher, because like the law of the Medes and Persians it stands immovable and unchanged through all time, even defying the statute of limitations, which outlaw civil judgments. The court in its opinion virtually finds that if the defendant had surreptitiously entered this country, or entered without inspection, that his point of law would be well taken, but because he escaped after his case had been denied, but while the petition for re-hearing was still undetermined, that he is in a worse position than one who enters in violation of the law. We do not assent to this view, and we feel that it is a reading of something into the statute which Congress has not placed there. In both acts in question Congress states that those who enter in violation of the law, or those who are found in this country in violation of the law, shall be deported in a certain way. There is nothing contained in either

act which would go to the extent of holding that Gin Dock Sue could have been summarily taken and deported without any warrant or process or authority for such action. In fact, when the Commissioner of Immigration sought to take this course, he was very promptly halted by the issuance of a writ of habeas corpus, and he thereupon surrendered the detained into the custody of the court, where this deportation case was then prosecuted. We have a case to cite to the court upon this point, which we feel is worthy of the most serious attention and consideration, and that case is the case of Re: Tom Hon, 149 Fed. 842, the opinion of which was written by Whitson, District Judge. Tom Hon was illegally in the United States, just as was Gin Dock Sue. Tom Hon was under a judicial order of remand taken into the custody of the Immigration officials for deportation to China. Tom Hon not only had the adverse finding of the appropriate customs or immigration authorities against him, but he had the valid judgment of the District Court registered against him, and yet as to him the court held:

> "It has been suggested that, inasmuch as the judgment is valid upon its face, the defendant should under it be remanded to the vessel, and be left to his remedy by writ of habeas corpus, whereby, if his contention is correct, he could be immediately discharged. Whether he could be so discharged by that method, in the light of the Ju Toy case, it may be confessed is open to doubt; but certainly, when a national court has

> jurisdiction over a Chinese person who claims to be a native-born citizen of the United States, who has been continuously in the country for the past sixteen years, and who has lived here most of his life, it will not subject him to the hazard of summary banishment upon a judgment which has been annulled by congressional legislation, without at least giving him an opportunity of presenting proofs of his citizenship and to establish the right to live in his native land."

In the case of Tom Hon, the court held that there was no subsisting judgment because Tom Hon had procured a certificate of registration and cured the illegality of his residence. In the present case Gin Dock Sue acquired a mercantile status and acquired an official position as a Consular attache, both of which are recognized by the statute, and considering the long lapse of time, and the entire history of Gin Dock Sue's residence in the United States it seems that every compelling force of equity and justice should bespeak the favorable consideration of the court for him. In the case of U. S. vs. Ju Toy, 198 U. S. 253, counsel for the appellant contended that a limitation should be read into the law. In other words, that when the law said in every case there should be excepted from this the case when citizenship was involved, and upon that point the Supreme Court said:

> "It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed,—as well when it is citizenship as when it is domicil, and the belonging to a class excepted from the exclusion acts. U. S. vs. Sing Tuck, 194 U. S. 161,167, 48 L. ed. 917, 920, 24 Sup. Ct. Rep. 621; Lem Moon Sing vs. United States, 158 U. S. 538, 546, 547, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967. It also is established by the former case and others which it cites that the relevant portion of the act of Aug. 18, 1894 (28 Stat. at L. 372) chap. 301, is not void as a whole. The statute has been upheld and enforced. But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. (Omitting cited cases.)

In the present case this Honorable Court, it seems, has attempted to read into the law a similar exception, that is,—that all aliens who enter in violation of law, or who are found here in violation of law, should not be meant to include those whose status had been adversely determined by the appropriate customs or immigration officials. We feel that any such limitation upon the plain wording of the stat-

ute is unwarranted, and is a doing of the very thing which the Supreme Court says shall not be done in U. S. vs. Ju Toy, supra. In other words, we feel that the decision of Judge Dooling in issuing the order to show cause in this case, when the Immigration authorities took the appellant into custody and attempted to summarily deport him upon a five and one-half year old denial entered in his case, branded their action most certainly and conclusively as an unwarranted and illegal action, and that if the appellant was to be deported at all, it could only be after a proper hearing in a court of justice upon the facts involved. The decision of the court in this present matter is virtually to reverse the finding of Judge Dooling in entertaining the petition for a writ of habeas corpus in the first instance. We do not feel that because the application of the detained to enter the United States was denied or prejudicially considered before his escape, exempt him from the plain all-embracing phrase in the law, of one found illegally in the United States, or who entered in violation of law. Clearly the appellant should be charged with being unlawfully in the United States irrespective of whether his right to entry had been previously predetermined or not.

In finally submitting this matter for the consideration of the court, we feel that the strong equities of the case should prevail and should come to the assistance of this appellant. That the court should not stop alone at the one fact that the appellant escaped from detention, but should really look into the facts and see why that detention existed in the first

place. If the appropriate customs and immigration officials had followed the statute, there would have been no detention, because appellant would have been permitted to go to China as a laborer, and have been landed as such upon his return. The fact that he did not do so was not the fault of the appellant, but the fault of the relators, in refusing him the certificate to which he was entitled by law.

Respectfully submitted.

GEORGE A. McGOWAN,
Attorney for Appellant.

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## CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for a rehearing is in judgment of counsel well founded, and is not interposed for delay.

GEORGE A. McGOWAN,
Attorney for Appellant.